

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CIVIL APPEAL NO. ABU 87 OF 2015**

**(High Court No. HBC 153 of 2012)**

**BETWEEN** : **ABCO BUILDERS LIMITED**

***Appellant***

**AND** : **STAR PRINTERY LIMITED**

***Respondent***

**Coram** : **Chandra RJA**

**Counsel** : **Ms. L. Vaurasi for the Appellant**  
**Mr. V. Singh for the Respondent**

**Date of Hearing** : **2 August 2016**

**Date of Ruling** : **7 December 2016**

## RULING

- [1] On 5 November 2015 the High Court at Suva delivered its judgment in Civil Action No.HBC 153 of 2012 in favour of the Appellant.
- [2] On 14 December 2015 the Appellant filed its notice of motion and grounds of appeal on the judgment confining the appeal to interest and costs.
- [3] A copy of the notice of appeal of the Appellant had been served on the Respondent's Solicitors on 17 December 2015.
- [4] On 7 January 2016 the Respondent filed a Notice of Cross-Appeal and grounds of Appeal.
- [5] By summons dated 13 January 2016 the Appellant sought orders to have the Respondent's cross-appeal notice struck out.
- [6] On 5 February 2016 the Respondent filed an application seeking enlargement of time to appeal in terms of section 20(1)(b) and Rule 17(3) of the Court of Appeal Act (Cap.12).
- [7] On 4 March 2016 the Respondent conceded that there were irregularities in its Respondent's Notice of Cross Appeal and consented to it being struck out.
- [8] The Respondent as well as the Appellant filed written submissions regarding the application of the Appellant for enlargement of time to appeal.

- [9] The judgment of the High Court was delivered on the 5<sup>th</sup> of November 2015, which meant that the appeal if any of the Respondent should have been filed by the 17th of December 2015.
- [10] The summons seeking enlargement of time to appeal was filed by the Respondent on 5 February 2016 which is opposed by the Appellant.
- [11] Justice Calanchini in **Singh v Hsian** (Civil Appeal No.ABU of 2014; 27 January 2016) in considering an application for enlargement of time to file a notice of appeal discussed the principles applicable to such as application as follows:

*“[6] Whether the application for an enlargement of time to appeal should be granted involves the exercise of a discretion. To ensure that the discretion is exercised in a principled manner the Supreme Court in **NLTB v Ahmed Khan and Another** (CBV 2 of 203; 15 March 2013 per Gates CJ) identified the factors that should be considered as being (a) the length of the delay, (b) the reasons for the delay, (c) whether there is a ground of merit justifying the appellate court’s consideration or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (d) if time is enlarged, will the Respondent be unfairly prejudiced. These factors assist the Court to determine whether it would be just in all the circumstances to grant or refuse the application. The onus is on the Appellant to show that in all the circumstances time should be enlarged”.*

### **The length of the delay**

- [12] The Respondent’s application seeking enlargement of time was filed on 5 February 2016 and was out of time by 50 days. A delay of periods less than 50 days also have been held to be fatal. In **Sharma v Singh** (2004) FJCA 52 ABU0027.2003S 11 November 2004, a period of 40 days, in **MacCaig v Manu** (2012) FJSC 18 a period of 2 days, have been held to be fatal. The delay of 50 days is fairly significant and has to be considered along

with the other principles regarding applications for enlargement of time and has to be determined according to the circumstances of the particular case.

**Reasons for the delay**

- [14] In the affidavits filed on behalf of the Respondent seeking enlargement of time, it has been stated that even though it was not satisfied with the judgment of the High Court at that time it had resolved not to appeal and had paid the judgment sum and costs to the Appellant. It was only after the Appellant's notice of appeal was served that the Respondent had reviewed its position and resolved to appeal the High Court judgment. The Respondent has also stated that it was under the impression that it could bring a cross appeal by filing a Respondent's notice but on realizing later that it was an irregular way of appealing had conceded to have the notice of cross appeal struck out and filed the application for enlargement of time.
- [15] It would appear from the reasons given by the Respondent that its decision not to appeal the judgment of the High Court had changed only after receiving the Appellant's notice of appeal which was in respect of a part of the judgment of the High Court and relating to the costs that had been ordered.
- [16] The Respondent's misunderstanding regarding the filing of a cross appeal cannot be considered as an acceptable reason for the delay as at the time that it was filed the period for filing an appeal had lapsed.
- [17] Although the Respondent had subsequently realized that it could not proceed with the cross appeal and had consented to it being struck out, that cannot be considered as being a satisfactory reason for the delay in seeking enlargement of time.

### Merits of the Appeal

[18] In the summons that has been filed on 5 February 2016 the orders that have been sought by the Respondent are:

“A. That the time allowed for the Respondent to file a Respondent’s Notice of Cross Appeal be enlarged.

B. That the costs of this application be costs in the cause.”

[19] The affidavit filed in support of that application is that of Sandeep Chauhan, a Director of the Respondent, on 5 February 2016 and sets out the sequence of events experienced by them up to the time of filing the notice of cross appeal and refers to the fact that he very believes that the Respondent’s Notice and Cross-Appeal contains meritorious grounds of appeal which should be heard and determined by the Court of Appeal.

[20] Prior to the filing of the application on 5 February 2016 an affidavit has been filed by Vikesh Chauhan Director of the Respondent, on 29 January 2016 titled “Affidavit in Response”, which is said to be an affidavit in response to the affidavit of Miriama Latianara filed on 12 January 2016 on behalf of the Appellant which was an affidavit supporting the application filed by the Appellant on 13 January 2016 to have the Respondent’s notice of cross appeal struck out.

[21] In the said affidavit Vikesh Chauhan has stated that on taking further advice regarding the cross appeal on receiving the Appellant’s summons of 13 January 2016, that he was acknowledging the fact that if they were to have filed an appeal, that they should have done so within 42 days of the Judgment of the High Court. Further, that he had instructed his Solicitor’s to make an application for an order that time be extended to file its cross appeal out of time. The cross-appeal was to be on the same grounds as set out in the Respondent’s notice and Grounds of Appeal filed on 7 January 2016.

- [22] The Respondent accepted that the filing of the cross appeal on 7 January 2016 was irregular and conceded to the said cross appeal being struck out on 4 March 2016.
- [23] The effect of the said striking out was that the notice and the grounds of appeal set out therein were not effective thereafter. However, no grounds of appeal were set out in the application for enlargement of time that was filed on 5 February 2016.
- [24] In the absence of grounds of appeal being set out in the affidavits supporting the application for enlargement of time, there are no grounds of appeal to be considered for the application for enlargement of time.
- [25] The Respondent had set out 14 grounds of appeal in its cross appeal (which was struck out) and the application seeking enlargement of time referred to those grounds. Technically, it is not necessary to consider the said grounds of appeal.
- [26] Written submissions have been filed by the Respondent in relation to the said grounds on the basis that they are arguable and meritorious. Though technically it would not be necessary to consider the said grounds, a consideration of the said grounds show that they are based on findings of fact by the learned trial Judge and are highly unlikely to succeed. There are no compelling reasons set out to reverse such findings of fact.
- [27] It is my considered view that the said grounds even if considered for the purposes of this application are devoid of merit.

### **Prejudice to the Appellant**

- [28] The Appellant has received the judgment sum and costs ordered by the High Court and what remains is the hearing of the appeal filed by the Appeal on limited grounds.
- [29] If leave is granted to the Respondent for enlargement of time, the Appellant would have to incur further expenses in countering it.
- [30] Considering all the circumstances, as the delay in filing the application is significant, the reasons being not satisfactory and there being no proper grounds of appeal (even if the grounds in the cross appeal are taken into account, they being devoid of merit) I would not exercise the discretion of granting an enlargement of time to the Respondent.
- [31] The Appellant has asked for costs regarding the application for enlargement of time as well as the striking out application.
- [32] Since the substantive appeal on the grounds filed by the Appellant is to be taken up at a future date it would be best to consider the costs that the Appellant is seeking now in respect of the two matters stated in paragraph 31 when its appeal is taken up for hearing.

### **Orders of Court:**

- (1) The Respondent's application for enlargement of time to appeal is dismissed;*

(2) *Costs regarding the application for enlargement of time and the application for striking out the cross appeal of the Respondent to be considered by the Full Court when the substantive appeal of the Appellant is heard.*





**Hon. Justice S. Chandra**  
**RESIDENT JUSTICE OF APPEAL**